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#### REMARKS

By this amendment, claim 11 is added to further define an aspect of the invention. Applicants request reconsideration of the rejection outlined in the Office Action of October 11, 2007.

In review, one rejection is made wherein claims 1-3, 5, and 9 stand rejected under 35 U.S.C. § 103(a) based on United States Patent No. 6,721,963 to Kawashima when taken in view of United States Patent No. 4,251,076 to Krupicka.

The reasoning for the rejection is outlined as follows:

#### FACTS

- 1) Kawashima discloses swimming goggles having a pair of lens assemblies.
- 2) Kawashima fails to disclose lens assemblies, wherein each assembly has a lens that is divided into an intermediate section extending across the lens at a substantially middle level as viewed in a vertical direction, an upper section lying above the intermediate section and a lower section lying below the intermediate section, wherein the intermediate section presents a see through clarity lower than those of the upper and lower sections.
- 3) Krupicka discloses a pair of swimming goggles comprising a pair of lenses that are connected by a nose-engaging bridge.
- 4) Krupicka also discloses lens assemblies that have a transverse section with a horizontal bar going across the middle of lens.
- 5) The bar of Krupicka has a see through clarity that is less than the sections of

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the lens above and below the bar.

6) Krupicka and Kawashima both disclose forms of eyewear.

#### REASONING

The reasoning provided by the Examiner does not expressly state how Kawashima is modified. Instead, the Examiner states:

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the teachings of Krupicka to modify Kawashima in order to provide eyewear that can provide alignment to the wearer during sporting activities.

While unstated, it appears that the Examiner is really saying that it would be obvious to employ the bar of Krupicka in the swimming goggles of Kawashima, and using such a bar creates a swimming goggle with the claimed intermediate section and claimed see through clarity.

Prior to traversing the rejection, Applicants note the Examiner's statement in the last response that no argument was made regarding the use of Krupicka in the rejection. Since the response demonstrated that primary reference was not prior art against the claims, there was no need to argue the specifics of Krupicka to overcome the rejection. Pointing out the fact that the primary reference was not prior art was sufficient to overcome the rejection and this is the reason that no arguments were made of record.

The rejection of the claims presents the following issue. Is it proper to modify the swimming goggles of Kawashima by installing the bar 22 used in the golfing aid spectacles of Krupicka? The answer to this question is no; it is not obvious for at least two reasons. One is that Krupicka is non-analogous art and is not properly combined with

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Kawashima. A second one is that the necessary rationale does not exist to support the modification of Kawashima.

The law of non-analogous art can be summarized as follows:

In order to rely on a reference as a basis for a rejection of an invention, the reference must be in the field of Applicants' endeavor, or, if not, then be reasonably pertinent to the particular problem with which the invention was concerned, see MPEP § 2141.01(a)(I).

Addressing the first test, the field of the endeavor is quite clearly swimming goggles. Krupicka is concerned with a golf aid in the form of particularly-configured spectacles that line up the direction of travel that is desired for a golf ball to take and to line up the face surface of the golf club with such direction of travel, see col. 1, lines 26-34. It cannot be disputed that a golf aid in the form of spectacles is not related to swimming goggles and Krupicka cannot be said to be in the same field of the Applicants' endeavor. Thus, the first test of whether Krupicka is analogous prior art is not passed.

Turning to the second part of the test, is Krupicka reasonably pertinent to the problem faced by the inventors? The problem is best explained with reference to pages 1 and 2 of the specification. Therein, the prior art goggles having an angled lens are problematic in that they can provide a field of view that is too large for the swimmer and can impair the swimmer's concentration. This problem is solved through the use of the intermediate section. As explained on page 7, lines 14-24, the intermediate section directs the swimmer's view to the upper or lower section, thus narrowing the field of

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vision, and the swimmer's concentration is sharpened.

In contrast to the problem to which the Applicants are concerned, Krupicka is concerned with golfing and improving the sighting that goes on when preparing to strike a golf ball. The MPEP section mentioned above cites two cases explaining how the second test may be met. The first case says that if the reference logically would have commended itself to an applicant's attention in considering the applicant's problem, it is analogous art. This situation is not even remotely present here. No amount of logic would commend the golf aid of Krupicka as a source of solving the problem of swimming goggles having fields of view that were too large for a swimmer during swimming competition.

The second case presented in the MPEP section says that if the reference discloses subject matter relevant to the problem being sought to be solved by Applicants, such a reference can be considered analogous art. This situation is also not present. The golfing aid spectacles of Krupicka is not in the least related to the too-large field of view problem for swimming goggles faced by Applicants.

Krupicka cannot be said to meet either test for analogous art and this reference is improperly relied upon to modify Kawashima. Being non-analogous art, Krupicka cannot be used to modify Kawashima, leaving the Examiner with only Kawashima to reject the claims. As admitted by the Examiner, a *prima facie* case of obviousness is not by Kawashima alone and since only Kawashima is part of the rejection, the rejection of claim 1 must be withdrawn.

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The Examiner attempts to bolster the rejection by characterizing Krupicka's golfing aid spectacle as "swimming goggles". This is a blatant contortion of the teachings of Krupicka. Krupicka cannot be considered to be swimming goggles for the simple reason that they provide no barrier to water when worn. There are no eyecups to surround the eye and seal it from water. Consequently, Krupicka cannot be considered to be in the same field of the invention just because the Examiner describes the golfing aid spectacles as "swimming goggles".

The Examiner also attempts to link Kawashima and Krupicka by reducing the teachings of each reference to "eyewear." This oversimplification of the teachings of Kawashima and Krupicka cannot support an argument that Krupicka is analogous art. Characterizing Krupicka and Kawashima as "eyewear" is tantamount to relying on a broad classification in the PTO Classification System as evidence of the analogous art nature of Krupicka. However, it is the similarities and differences in structure and function that carry more weight in determining analogous art, see MPEP §2141.01(a)(II). When viewing the structure and function of the golfing aid of Krupicka, there is no discernible similarity to the swimming goggles of the invention. The structure is entirely different in that the spectacles of Krupicka lack the necessary eye cups for sealing to be useful as swimming goggles. In addition, the function of the spectacles of Krupicka relates to aligning the travel direction of a golf ball and the face of a golf club, which has no similarity to swimming goggles and the use of an intermediate section to narrow the field of view of a swimmer for improved concentration. Thus, broadly characterizing Krupicka

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and Kawashima as eyewear belies the fundamental differences in structure and function, and it is these differences that control the decision as to whether Krupicka is analogous art or not, which it is clearly not.

Applicants' second argument is that the reasoning for combining the references is improper and, in fact, the Examiner has not supplied the proper rationale to support the conclusion of obviousness.

In the rejection, the Examiner says that the one of skill in the art would use the horizontal bar of Krupicka on the goggles of Kawashima so that alignment can be provided to the wearer during sporting activities. This reasoning is not based on the teachings of the prior art and unfairly distorts the true teachings of each of Kawashima and Krupicka.

While it is true that Kawashima and Krupicka are concerned with sporting activities, the wearer of the goggles of Kawashima is in no need of the type of alignment provided by the spectacles of Krupicka. The alignment provided by the spectacles of Krupicka relates to golfing and the travel of a golf ball and alignment of the golf club head. This type of alignment has nothing to do with swimming goggles or swimming. Therefore, there is absolutely no reason that one of skill in the art would look to a golfing aid spectacle as in Krupicka to modify the lens assemblies of Kawashima.

Yet another reason that the modification of Kawashima is improper is that requirement that the bar of Krupicka move vertically by sliding on the outer edges of each lens assembly. To apply the teachings of Krupicka to Kawashima, the Examiner must also

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include the ability of the bar 22 to move up and down for alignment purposes. Given that Kawashima uses oval shaped eye cups, how is it that the bar 22 of Krupicka can be used with the swimming goggles of Kawashima and, at the same time, retain the vertical movement functionality of the bar required by Krupicka? Kawashima and Krupicka are incompatible in this regard, and this incompatibility is another reason why the modification of Kawashima using Krupicka's teachings makes no sense.

Therefore, the conclusion of obviousness lacks the required reasoning to support such a rejection and with this absence of rationale, the rejection could not be sustained on appeal. What the Examiner has done is to draw a conclusion of obviousness without any factual basis and the rejection of claim 1 must be withdrawn for this reason alone.

To summarize and relying on the two arguments set forth above, a *prima facie* case of obviousness has not been established against claim 1 and the rejection based on Kawashima and Krupicka must be withdrawn.

Claim 11 is separately patentable over the applied prior art. This claim requires that the intermediate section extend from one side of the frame portions of the eye cup and terminates at an opposite side. This can be best seen in Figure 1, wherein the belt like portion 13 extends between side portions of each eye cup frame.

The structure of claim 11 is not found in Krupicka even if this reference were combined with Kawashima. Krupicka teaches that the bar extends from the side of one lens assembly to the side of the other lens assembly. The bar does not terminate at the other side of the same lens assembly so that this feature is not found in Krupicka even if

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combined with Kawashima.

The question does remain as to whether Krupicka could be further modified such that the bar 22 could be split into two bars, each associated with a respective lens assembly. Applicants submit that since the bar 22 is designed to be slid on the frame, splitting the bar into two bars would interfere with this function. In fact, it is argued that splitting the bar into two pieces would make the spectacle inoperative for its intended purpose. This is because the nose side edges of the frames are not parallel to the outer side edges of the frames. This non-parallel configuration of frame sides would prevent the bar from moving up and down as it does when attached to the parallel outer sides of each lens assembly of Krupicka.

Given that the modification of the Krupicka bar as used in Kawashima would render it useless for its intended purpose, there is no legitimate basis for making this modification and claim 11 is separately patentable over the applied prior art.

To summarize, the Examiner should allow the application since the prior art rejection is overcome by the arguments made above.

Also, since generic claim 1 is allowable, the election of species requirement must be withdrawn so that all claims are allowed.

Accordingly, the Examiner is respectfully requested to examine this application in light of the remarks made above, and pass all pending claims onto issuance.

If the Examiner believes that an interview would be helpful in expediting the allowance of this application, the Examiner is requested to telephone the undersigned



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at 202-835-1753.

The above constitutes a complete response to all issues raised in the Office Action dated October 11, 2007.

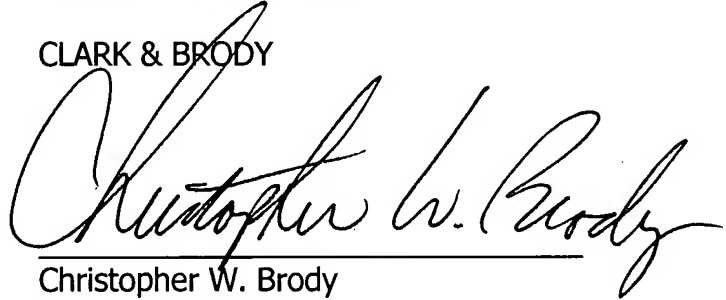
Again, reconsideration and allowance of this application is respectfully requested.

Please charge any fee deficiencies to Deposit Account No. 50-1088 and credit any excess fees to the same account.

Respectfully submitted,

CLARK & BRODY

By

A handwritten signature in cursive script, reading "Christopher W. Brody", written over a horizontal line.

Christopher W. Brody  
Reg. No. 33,613

Customer No. 22902  
1090 Vermont Ave. NW Suite 250  
Washington, DC 20005  
Telephone: 202-835-1111  
Facsimile: 202-835-1755  
Docket No.: 12010-0056  
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